

ORIGINAL

91-7611

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
SPRING TERM, 1992

Supreme Court, U.S.
FILED

MAR 12 1992

OFFICE OF THE CLERK

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

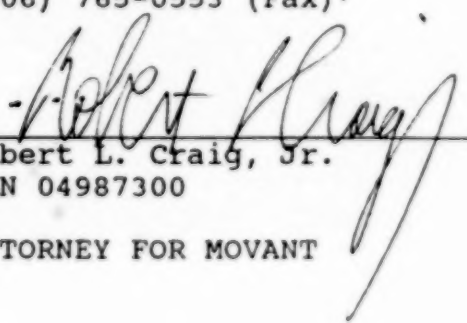
NOW COMES Movant, JAMES EDWARD LANGSTON, by and through his attorney, Mr. Robert L. Craig, Jr., who files this motion to proceed in forma pauperis, and would show the Court as follows:

1. Counsel has been previously appointed under the Criminal Justice Act to represent Movant in prior proceedings. Counsel was appointed under the Criminal Justice Act of 1964, as amended, by the Fifth Circuit of Appeals. A copy of that appointment previously filed with the Fifth Circuit is attached as Exhibit "A."

2. Movant requests that the Court note the previous appointment and carry it over into this proceeding pursuant to the Supreme Court of the United States Rule 39.

WHEREFORE, PREMISES CONSIDERED, Movant requests the Court to grant his motion to proceed in forma pauperis.

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Robert L. Craig, Jr.
SBN 04987300

ATTORNEY FOR MOVANT

2894 (4)

CJA 20 (Int. - 4/88) **APPOINTMENT OF AND AUTHORITY TO PAY COURT APPOINTED COUNSEL**

JURISDICTION <input type="checkbox"/> MAG. 2 <input type="checkbox"/> DIST. 4 <input checked="" type="checkbox"/> APPEALS <input type="checkbox"/> OTHER		2. MAG. DOCKET NO.	3. DIST. CT. CR5-90-040-1	4. SET NO.	VOUCHER NO. 0286642
APPEALS DOCKET NO. 90-1682	5. FOR (DISTRICT/CIRCUIT) FIFTH	6. LOC. CODE LAUNO	7. CHARGE/OFFENSE (U.S. or other) 21:841(a)(1) 1718:924		7A. CASE CODE TD
8. IN THE CASE OF USA vs LANGSTON,			9. PERSON REPRESENTED (FULL NAME) JAMES EDWARD LANGSTON		9A. NO. REPRES.
10. PERSON REPRESENTED (STATUS) 1 <input type="checkbox"/> DEFENDANT-ADULT 3 <input checked="" type="checkbox"/> APPELLANT 5 <input type="checkbox"/> OTHER 2 <input type="checkbox"/> DEFENDANT-JUVENILE 4 <input type="checkbox"/> APPELLEE			11. PROCEEDINGS (Describe briefly) FILED		
12. PAYMENT CATEGORY A <input type="checkbox"/> FELONY C <input type="checkbox"/> PETTY OFFENSE E <input type="checkbox"/> OTHER B <input type="checkbox"/> MISDEMEANOR D <input checked="" type="checkbox"/> APPEAL			13. COURT ORDER O <input checked="" type="checkbox"/> Appointing Counsel F <input type="checkbox"/> Subs. for FD P <input type="checkbox"/> Subs. for Panel Atty. C <input type="checkbox"/> Co-Counsel R <input type="checkbox"/> Subs. for Retained Atty. Because the above-named "person represented" has testified under oath or has otherwise satisfied this court that he or she (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney whose name appears in item 14 is appointed to represent this person in this case. <i>Mary A. Ropizars</i> Sig. of Presiding Judicial Officer or By Order of Court (Clerk/Deputy)		
14. NAME OF ATTORNEY/PAYEE AND MAILING ADDRESS Bob Craig P O Box 2585 Lubbock, TX 79408			15. TELEPHONE NO. 806/765-7491		
16. SOC. SEC. NO. 466-76-6070			17. CLAIM FOR SERVICES OR EXPENSES		
17. IN COURT a. Arraignment and/or Plea b. Bail and Detention Hearings c. Motions Hearings d. Trial e. Sentence Hearings f. Revocation Hearings g. Appeals Court h. Other (Specify on additional sheets) (Rate per hour =) TOTAL HOURS =					
18. OUT OF COURT a. Interviews and conferences b. Obtaining and reviewing records c. Legal research and brief writing d. Travel time (Specify on additional sheets) e. Investigative and other work (Specify on additional sheets) (Rate per hour =) TOTAL HOURS =					
19. EXPENSES TRAVEL, LODGING, MEALS ETC. AMOUNT OTHER EXPENSES AMOUNT 20. GRAND TOTAL CLAIMED					
21. CERTIFICATION OF ATTORNEY/PAYEE FOR PERIOD TO F <input type="checkbox"/> Final Payment I <input type="checkbox"/> Interim Payment No. Has compensation and/or reimbursement for work in this case previously been applied for? <input type="checkbox"/> YES <input type="checkbox"/> NO If yes, were you paid? <input type="checkbox"/> YES <input type="checkbox"/> NO If yes, by whom were you paid? How much? Has the person represented paid any money to you, or to your knowledge to anyone else, in connection with the matter for which you were appointed to provide representation? <input type="checkbox"/> YES <input type="checkbox"/> NO If yes, give details on additional sheets. swear or affirm the truth or correctness of the above statements SIGNATURE OF ATTORNEY/PAYEE DATE					
22. IN COURT COMP. \$		23. OUT OF COURT COMP. \$		24. TRAVEL EXPENSE \$	
25. OTHER EXPENSES \$		26. TOTAL AMT. APPROVED/CERT. \$		27. SIGNATURE OF PRESIDING JUDICIAL OFFICER DATE	
28. SIGNATURE OF CHIEF JUDGE, CT. OF APPEALS (OR DELEGATE) DATE		29. TOTAL AMT. APPROVED \$		27A. JUDGE/MAG. CODE	

APPROVED FOR PAYMENT

ORIGINAL - MAIL TO ADMINISTRATIVE OFFICE AFTER SERVICE RENDERED Exhibit "A"

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
SPRING TERM, 1992

JAMES EDWARD LANGSTON,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Robert L. Craig, Jr.
Counsel of Record for Petitioner
Texas Bar No. 04987300

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QUESTIONS PRESENTED

1. Whether mere presence in a room constitutes "use" of a firearm so as to meet due process requirements of proof beyond a reasonable doubt of possessing a firearm during the commission of an entirely unrelated crime.
2. Whether a conspiracy exists between three defendants without some connection or agreement between the parties so as to meet due process requirements of proof beyond a reasonable doubt.
3. Whether a criminal defendant may reserve an evidentiary issue for appeal solely by making a timely objection at trial.
4. Whether the Court of Appeals violated Petitioner's right to Due Process under the Fifth Amendment through its application of FED. R. APP. P. 10(b).

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IN THE
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JAMES EDWARD LANGSTON,
Petitioner,
VS.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

The Petitioner, JAMES EDWARD LANGSTON, prays that this Court issue a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, rendered in these proceedings on December 18, 1991.

OPINION BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, appears at Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals, Fifth Circuit, was rendered on December 18, 1991. Jurisdiction to review said judgment herein by writ of certiorari is conferred on this Court by 28 U.S.C.A. 1254(1).

**CONSTITUTIONAL PROVISIONS, STATUTES AND
RULES INVOLVED**

U.S. Constitution Amendment V:

"Nor shall any person...be deprived of life, liberty, or property, without due process of law..."

Federal Rules of Appellate Procedure, Rule 10(B) (2):

"If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion."

STATEMENT OF THE CASE

Petitioner had court-appointed trial counsel. Petitioner, through his trial counsel and counsel on appeal, argued that the Petitioner did not have "use" of a weapon. The Petitioner was convicted of intending to use a gun during the commission of a drug offense. The mere presence of a firearm does not constitute "use" as contemplated by Title 18, United States Code, § 924(c) (1). The due process requirements were not met because there was no relation

or connection between the firearm and the underlying crime.

Trial court counsel and counsel on appeal further argued and objected that any conspiracy between Petitioner, Rodney Featherson and Ray Langston does not meet the due process requirements of proof beyond a reasonable doubt. The government asserted a conspiracy among three defendants, pursuant to Title 21, United States Code, § 846. No agreement or connection existed between the Petitioner and Rodney Featherson.

Transcripts of audio tapes relating to conversations between the confidential informants and Petitioner were offered by the government as an aid to the jury. The tapes were of poor quality. The transcripts published to the jury as a trial aid differed from those previously furnished Petitioner in at least a dozen instances, including the alleged identity of the speaker on some occasions. Petitioner objected to the use of such transcripts as a jury aid. The government admitted that the transcripts were not furnished to Petitioner's counsel prior to trial and that the transcripts were developed on Saturday and Sunday prior to trial using equipment not made available to Petitioner's counsel. Despite these admissions and no showing of any reason for such government tactics, the District Court overruled Petitioner's objections.

Before the Fifth Circuit, Petitioner was represented by different counsel. Petitioner argued that the trial court erred by allowing the government to exert an immense tactical advantage over Petitioner, an indigent defendant. However, the Court ruled that

Petitioner waived his right to complain about the transcripts because he did not move for a recess or continuance after the transcripts were admitted in the District Court. Moreover, even though the transcripts were never admitted into evidence, the Court said that Petitioner failed to preserve error by not transmitting the transcripts to the Fifth Circuit.

REASONS FOR GRANTING THE WRIT

1. *The Court of Appeals has rendered a decision herein in conflict with the decision of the United States Court of Appeals, Second Circuit, in United States v. Feliz-Cordero, and in the United States Court of Appeals, Third Circuit, in United States v. Theodoropoulos, and the decision does not meet due process requirements of proof beyond a reasonable doubt.*

ARGUMENT AND AUTHORITIES

A person cannot be said to "carry" a firearm without at least showing that the gun is within reach during the commission of the drug offense. U. S. v. Feliz-Cordero, 859 F.2d 250 (2nd Cir. 1988). Because the firearm was not within the reach of the Appellant, JAMES EDWARD LANGSTON, a conviction in this situation cannot stand unless it is predicated on the provision of 18 United States Code § 924c(1) relating to "uses a firearm."

Feliz-Cordero, at 254, states in relevant part as follows:

In 1984, Congress revised § 924(c). Prior to 1984, the statute provided that it was a crime to carry a firearm 'during the commission of any felony'. 18 U.S.C. § 924 (c)(2)(1982). The 1984 amendment established as the predicate offense 'any crime of violence' instead of 'any felony' and substituted the phrase 'during and in relation to' for the word 'during.' In 1986, the statute was again amended to add 'drug trafficking crime' as a 'predicate offense.'

The legislative history of the 1984 amendment indicates

that the 'in relation to' language was intended to make explicit that a person could not be prosecuted under § 924(c) for possessing a firearm during the commission of an entirely unrelated crime. (Citations omitted.) Thus, § 924(c) requires more than mere possession of a firearm. Rather, there must be some relation or connection between the firearm and the underlying crime. The necessary relation or connection between possession of a firearm and the underlying crime is established 'if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape.'

Based on the foregoing analysis, in order for possession of a firearm to come within the 'uses' provision of § 924(c), one of the following is required:

- i. Proof of a transaction in which the circumstances surrounding the presence of a firearm suggests that the possessor of the firearm intended to have it available for possible use during the transaction; or
- ii. The circumstances surrounding the presence of a firearm in a place where drug transactions take place suggests that it was strategically located so as to be quickly and easily available for use during such a transaction.

The presence of a firearm in a dresser drawer does not meet either of the requirements set out above. On the evidence presented, there is no basis to conclude that the gun would have been quickly accessible if needed. Rather, under the circumstances of this case, the intent to use the firearm must be presumed from the fact that a loaded gun was found in the same room as drug paraphernalia during the course of a search pursuant to a warrant. This is not sufficient evidence to sustain a conviction, even in light of our recognition of the frequent connection between firearms and narcotics trafficking.

In U.S. v. Theodoropoulos, 866 F.2d 587 (3rd Cir. 1989), the Court also examined and wrote about the 1984 amendment to § 924(c). The Court noted that in light of the 1984 amendment, that the

Feliz-Cordero court held that a loaded gun concealed in a drawer, which was discovered during the search of defendant's apartment, was not used during or in relation to a drug trafficking offense.

In Theodoropoulos, at page 597-598, the Court stated that they could not agree with the government that the mere availability of a firearm nearby, as distinguished from its open display, is equal to use "in relation" to an offense. We note that in drafting this provision, Congress required either use or carrying of a firearm. Had it intended the provision to encompass possession of a firearm during a drug trafficking offense, it would have so provided.

In the case at bar, Petitioner was in Apartment No. 3, which was not registered or rented to JAMES EDWARD LANGSTON, nor did JAMES EDWARD LANGSTON have a key to the apartment. Upon search of the apartment, the firearm was found between the mattress and box springs in the living room/bedroom combination. (R2: 259). The Petitioner was standing 6 to 8 feet from where the firearm was located. (R2: 259). The firearm was not quickly accessible if needed. The government's own witness, Officer James H. Taylor, a sergeant with the City of Lubbock Police Department assigned to the Narcotics Division, who participated in the search of Apartment No. 3 at 1702 Avenue B in Lubbock, Texas, testified that no one had dominion and control over the weapon at that particular time. (R2: 284).

A motion for judgment of acquittal was made by the Petitioner. (R4:656).

This is not a case where officers have found multiple weapons

in strategic locations. This is simply a case where the presence of a single firearm has been found during the search of the apartment and a conviction should not stand. The standard used by the Fifth Circuit is clearly in conflict with Feliz-Cordero and Theodoropoulos. Further, it violates the constitutional necessity of proof of guilt beyond a reasonable doubt, as guaranteed by due process. Jackson v. Commonwealth of Virginia, 443 U.S. 307, 61 L.Ed. 560, 99 S.Ct. 2781 (1979).

The United States Supreme Court has an opportunity in this case to decide what constitutes "use" as required by § 924(c).

2. *The Court of Appeals has rendered a decision herein in conflict with the decision of the United States Court of Appeals, Second Circuit, in United States v. Tyler, and the decision does not meet due process requirements of proof beyond a reasonable doubt.*

ARGUMENT AND AUTHORITIES

In United States v. Tyler, 758 F.2d 66 (2nd Cir. 1985), helping a willing buyer locate a willing seller, standing alone, is insufficient to establish the existence of an agreement between the facilitator and the seller [citing U.S. v. Hysolion, 448 F.2d 343, 347 (2nd Cir. 1971) ("the fact that Rimbaud told Everett, a willing buyer, how to make contact with a willing seller does not necessarily imply that there was an agreement between that seller . . . and Rimbaud."); and citing U.S. v. Torres, 519 F.2d 723, 726 (2nd Cir.), cert. denied, 423 U.S. 1019 (1975) ("membership in a conspiracy is not established . . . by the fact that a defendant told a willing buyer how to make contact with a willing seller.")]

In the case at bar, the Petitioner was indicted on a conspiracy with his brother, Ray Langston, and Rodney Featherson, in violation of Title 21, United States Code, § 846. To establish defendant's guilt on the conspiracy count to possess with intent to distribute, the government must prove beyond a reasonable doubt:

1. The existence of an agreement between two or more persons to violate the narcotics law;
2. The defendant knew of the conspiracy; and
3. The defendant voluntarily participated in the conspiracy.

There is no showing of a connection or agreement between JAMES EDWARD LANGSTON (Petitioner) and Rodney Featherson. The government has alleged a conspiracy among all three defendants. The government's own agent, Felix Garcia, on cross-examination, was questioned about the existence of a partnership. Garcia admitted during cross-examination that statements made by the Petitioner, the other defendants, and the confidential informant do not refer to any type of partnership. (R3: 460-464). The Fifth Circuit in deciding the case at bar is in conflict with Tyler, and violates the due process rights guaranteed to the Petitioner. The United States Supreme Court has an opportunity in this case to decide what is required to show a connection sufficient to establish a conspiracy.

3. *The Court of Appeals has rendered a decision herein in conflict with the decision of the United States Court of Appeals, First Circuit, in United States v. Osorio.*

ARGUMENT AND AUTHORITIES

In United States v. Osorio, 929 F.2d 753, 758 (1st Cir. 1991), the defendant was convicted of conspiring to distribute cocaine and of cocaine possession. The prosecution delayed disclosure of evidence that one of its witnesses had a more extensive background in possession than he had previously admitted. Unlike Petitioner in the case at bar, the defendant made no objection to the government's use of the evidence. In holding against the defendant, the Court emphasized the fact that defense counsel made no motion for continuance, motion for dismissal, or objection. Id. In other words, the defendant would have maintained his right to complain about the government's unfair tactics, if he had simply objected at trial.

In the case at bar, Petitioner did object to the government's use of the transcripts. Accordingly, under Osorio, Petitioner preserved his right to complain about the government's use of the transcripts as a jury aid. However, the Fifth Circuit still found against Petitioner. The Court held that in order to salvage his right to complain about the transcripts, Petitioner had to move for a recess or a continuance after the transcripts were published to the jury.

The Fifth Circuit is clearly using a different standard than the First Circuit. Furthermore, as it cited Osorio in ruling that the Petitioner's objection was not sufficient to save his right to complain about the transcripts, the Fifth Circuit obviously has a muddled understanding of the standard now being used by the First Circuit. The Fifth Circuit misapplied the case in their opinion.

The United States Supreme Court has an opportunity in this case to decide what a person must do at trial to preserve error for appeal.

4. *The Fifth Circuit has denied Petitioner Due Process under the Fifth Amendment through its arbitrary application of FED. R. APP. P. 10(b).*

ARGUMENT AND AUTHORITIES

The government transcripts at issue were not part of the record on appeal. FED. R. APP. R. 10(b) requires the appellant to supplement the record with any information relevant to the appeal that is not part of the trial record. See, Adams v. Johns-Manville Sales Corp., 783 F.2d 589, 592 (5th Cir. 1986). Accordingly, Petitioner does not dispute that many of the cases interpreting Rule 10 hold him responsible for including the transcripts in the appellate record. Petitioner believes that these cases should be held as bad law regarding the peculiar circumstances of this case.

The only party to ever have control of the transcripts was the government. Moreover, since the transcripts were not admitted into evidence, they were not part of the trial record. Petitioner, represented by different counsel on appeal, never even had a copy of the transcripts. Still, the Fifth Circuit refused to hear Petitioner's issue because he was unable to produce what he did not have. Simply put, Petitioner did not have the instrumentality to comply with Rule 10.

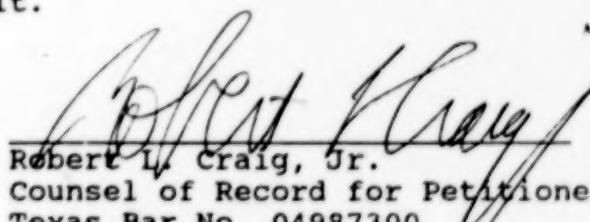
The Court in U.S. v. Onori, 535 F.2d 938, 948 (5th Cir. 1978), held that it is unnecessary for the trial court to decide whether a transcript is accurate before it is given to the jury, so long as

each party is given an opportunity to submit a transcript that contains its version of the conversation. In other words, as long as each side has a fair and equal opportunity to provide the jury with a transcript that he thinks represents the sounds on the tapes, then the jury may read the transcripts along with the tapes. In the case at bar, the government was given an unfair advantage regarding both the last minute timing of the transcription and its access to superior equipment.

For the Fifth Circuit to deny Petitioner an opportunity to discuss the impropriety of the trial court's decision solely because of Petitioner's inability to fulfill an impossible task is an outrage worthy of this Court's review. Thus, through its application of Rule 10 to Petitioner's case, the Court of Appeals violated Petitioner's right to due process under the Fifth Amendment.

CONCLUSION

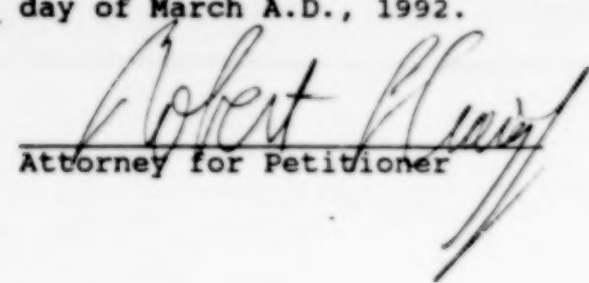
For the reasons set forth above, a Writ of Certiorari should be issued to review the judgment and opinion of the United States Court of Appeals, Fifth Circuit.


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CERTIFICATE OF SERVICE

I hereby certify that three true copies of the foregoing Petition for Writ of Certiorari have been duly mailed to counsel for the United States of America, Honorable Joe C. Lockhart, Assistant U.S. Attorney, 1205 Texas Avenue, Lubbock, Texas, and Solicitor General of the United States, Department of Justice, Washington, D.C. 20503, this 11 day of March A.D., 1992.


Attorney for Petitioner

UNITED STATES of America,
Plaintiff-Appellee.

v.

Rodney FEATHERSON, a/k/a River Rat,
James Edward Langston, and Ray
Langston, a/k/a Big Ray, Defendants-
Appellants.

No. 90-1681.

United States Court of Appeals,
Fifth Circuit.

Dec. 18, 1991.

Defendants were convicted of conspiracy to distribute cocaine and of use of firearm in connection with drug trafficking crime by the United States District Court for the Northern District of Texas, Samuel Ray Cummings, J., and they appealed. The Court of Appeals, Emilio M. Garza, Circuit Judge, held that: (1) denial of defendant's motion to sever was not abuse of discretion; (2) finding as to existence of conspiracy was sufficiently supported by evidence of defendants' use of same flats to make multiple cocaine sales and of referrals between them; and (3) finding that defendant had used weapon in connection with drug trafficking crime was sufficiently supported by evidence.

Affirmed.

1. Criminal Law ¶622

As general rule, defendants who are indicted together are tried together.

2. Criminal Law ¶622

Rule in favor of joint trials for jointly indicted defendants is especially strong

when defendants are charged with committing same conspiracy.

3. Criminal Law ¶1148

Court of Appeals reviews district court's denial of motion for severance for abuse of discretion.

4. Criminal Law ¶1148

To demonstrate abuse of discretion in denial of motion for severance, defendants must show that joint trial prejudiced them to such an extent that district court could not provide adequate protection, and that prejudice outweighed Government's interest in economy of judicial administration.

5. Criminal Law ¶1166(6)

Denial of motion for severance will result in reversal only where defendants can show that they were unable to obtain fair trial without severance.

6. Criminal Law ¶1166(6)

Showing of compelling prejudice is required before Court of Appeals may overrule district court's decision regarding severance.

7. Criminal Law ¶622.1(2)

Denial of drug conspiracy defendants' motion for separate trials was not abuse of discretion, where Government made complete and coherent case against each defendant, and there was no indication that jury did not consider each defendant individually or each offense separately.

8. Criminal Law ¶1044.1(5)

Defendants waived right to complain about Government's introduction of transcripts of tape-recorded conversations before they had opportunity to review transcripts.

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scripts, by failing to move for recess or continuance after transcripts were admitted in district court.

9. Criminal Law ¶1159.6

In reviewing challenge to sufficiency of evidence, appellate court need not find that evidence excludes every reasonable hypothesis of innocence or is wholly inconsistent with every conclusion except that of guilt, provided that reasonable trier of fact could find that evidence establishes guilt beyond reasonable doubt.

10. Criminal Law ¶1144.13(3, 5)

On sufficiency of evidence challenge, Court of Appeals reviews evidence in light most favorable to Government, making all reasonable inferences and credibility choices in favor of verdict.

11. Conspiracy ¶24.5, 28(3)

For defendants to be convicted of conspiracy to distribute narcotics, Government must prove beyond reasonable doubt that conspiracy existed, that defendants knew of conspiracy, and that with this knowledge they voluntarily became part of conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

12. Conspiracy ¶44½

Conspiracy may be inferred from concert of action.

13. Conspiracy ¶40.1

Conspirator cannot escape criminal liability on basis that he played only a minor role in total scheme.

14. Conspiracy ¶47(12)

Finding that defendants were engaged in conspiracy to distribute cocaine was suf-

ficiently supported by evidence, including evidence that two conspirators repeatedly went to same flats where they made multiple cocaine sales, and that third conspirator had drug-related conversations with second, had drug-related contacts with second, accepted referrals from second conspirator and had apartment in flats near those frequented by other conspirators. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

15. Weapons ¶4

Government need not prove actual use or brandishing of weapon, in order to obtain conviction for use of firearm in connection with drug trafficking crime. 18 U.S.C.A. § 924(c)(1).

16. Weapons ¶17(4)

Government may meet its burden of showing that firearm was used in connection with drug trafficking crime, within meaning of federal criminal statute, by showing that weapon involved could have been used to protect or had potential of facilitation of operation, and that presence of weapon was connected with drug trafficking. 18 U.S.C.A. § 924(c)(1).

17. Weapons ¶17(4)

Defendant's conviction for use of firearm in connection with drug trafficking crime was sufficiently supported by evidence that defendant was apprehended in apartment near table which was covered with large quantities of cocaine hydrochloride, cocaine base, baking soda and razor blades, and that approximately six to eight feet from where defendant was standing, officers found loaded semiautomatic pistol under mattress, as well as by defendant's statement to woman who was with him in

apartment "Don't say it's mine." 18 U.S.C.A. § 924(c)(1).

18. Weapons —17(4)

Defendant's conviction for use of firearm in connection with drug trafficking crime was sufficiently supported by evidence, including evidence that police found several bundles of cocaine in car which defendant was driving, in addition to unloaded semiautomatic pistol under driver's seat of car where defendant had been sitting and additional guns and ammunition in trunk of car. 18 U.S.C.A. § 924(c)(1).

19. Criminal Law —822(1)

Standard of review for jury instructions is usually whether court's charge, as whole, is correct statement of law and plainly instructs jurors as to principles of law applicable to fact issues confronting them.

20. Criminal Law —1038.1(2)

Standard of review for jury instructions is one of plain error, where defendant did not object to instructions at trial.

21. Criminal Law —1030(1)

"Plain error" is error which is so fundamental as to result in miscarriage of justice.

See publication Words and Phrases for other judicial constructions and definitions.

22. Weapons —17(6)

Trial court's instruction to jury, that it was entitled to consider firearms found in trunk of car that defendant was driving in deciding whether defendant had used firearm in connection with drug trafficking crime, was not plainly erroneous.

23. Criminal Law —1122(5)

Defendant waived argument concerning jury instruction, where contested jury instruction was not in appellate record.

Appeal from the United States District Court for the Northern District of Texas.

Before KING, JOHNSON, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Defendants Rodney Featherston ("Featherson"), James Edward Langston ("James"), and Ray Langston ("Ray") appeal their convictions for various controlled substance violations. They allege: (1) the district court abused its discretion in denying the motions of severance of James and Ray; (2) the district court exceeded its discretion by allowing the jury to use transcripts of audio recordings; (3) there was insufficient evidence to support their convictions of conspiracy with intent to distribute; (4) there was insufficient evidence to support the convictions of James and Featherston for use of a firearm during a drug trafficking crime; and (5) the district court gave an incorrect jury instruction. Finding no error, we affirm.

I.

BACKGROUND

On April 25, 1990, James, Ray and Featherston were charged in a twenty-one count indictment involving various controlled substance violations, including conspiracy to possess with intent to distribute fifty grams or more of cocaine base.

During the period from September 19, 1989 to March 29, 1990, Bureau of Alcohol, Tobacco and Firearms ("ATF") agent Felix Garcia ("Agent Garcia") used confidential informants, Eddie Ward ("Ward") and Shawn Harris ("Harris"), to make numerous purchases of cocaine base or crack cocaine, primarily in the 1700 block of Avenue B ("the flats") in Lubbock, Texas. To prepare for these controlled buys, Agent Garcia would search the informants, place a listening device on them, and then give the informants instructions and funds to purchase crack cocaine. The informants would then make such purchases, and the broadcast of these transactions was then monitored and recorded by surveillance agents. After the transactions, the informants would give the crack cocaine and any remaining buy-money to Agent Garcia. The confidential informants purchased cocaine base or crack cocaine from James, Ray, and Featherston.

These drug transactions played out as follows: on September 19, 1989, Ward went to the flats and James sold him cocaine base; on October 2, 1989, James sold Ward more cocaine base; on October 16, 1989, Ray sold Ward cocaine base at the flats; and, on October 20, 1989, and October 24, 1989, Ray again sold Ward cocaine base at the flats.

Then, on November 19, 1989, the Lubbock police found Featherston with cocaine base in his car. Featherston also had a .25 semi-automatic pistol, a .357 caliber Smith & Wesson, and a .22 caliber revolver in his possession. On January 15, 1990, the Lubbock police found James in an apartment in the flats where James and Ray were at-

tempting to manufacture cocaine base. In addition to the drugs found in the apartment, James had a loaded .380 semi-automatic pistol which the police officers found between a mattress and box springs approximately six to eight feet from where James had been standing.

The controlled buys continued: on March 12, 1990, and again on March 15, 1990, Ray referred Ward to Featherston who sold Ward cocaine base; on March 27, 1990, James and Ray sold cocaine base to Harris; and on March 29, 1990, Ray again sold Harris cocaine base. On March 30, 1990, several federal search warrants were executed on several rooms in the flats; one of these rooms was in Ray's temporary possession. All three defendants were subsequently indicted.

Following a jury trial, James was convicted of eleven counts of drug-related violations; Ray was convicted of twelve counts of drug-related violations; and Featherston was convicted of eight counts of drug-related violations. James was given two sentences—one of 136 months' imprisonment and one of 60 months' imprisonment; Ray was sentenced to 188 months' imprisonment; and Featherston was given two sentences—one of 135 months' imprisonment and one of 60 months' imprisonment. Each defendant also received a five year term of supervised release. All three defendants timely appealed.

II.

THE MOTIONS TO SEVER

[1,2] James and Ray argue that the district court erred by denying their sepa-

tionally sentenced to 60 months' imprisonment for their convictions relating to possession of a firearm during a drug trafficking offense. See *infra* note 5.

1. James' sentence of 136 months' imprisonment, Ray's sentence of 188 months' imprisonment, and Featherston's sentence of 135 months' imprisonment were for the drug counts. James and Featherston were addi-

rate motions for severance. As a general rule, defendants who are indicted together are tried together. See *United States v. Arzola-Amaya*, 867 F.2d 1504, 1516 (5th Cir.), cert. denied, 493 U.S. 933, 110 S.Ct. 322, 107 L.Ed.2d 312 (1989) (citation omitted). This rule is especially strong when the defendants are charged with committing the same conspiracy. See *United States v. McGuire*, 608 F.2d 1028, 1031 (5th Cir.1979), cert. denied, 446 U.S. 910, 100 S.Ct. 1838, 64 L.Ed.2d 262 (1980) (citation omitted).

[3-6] This court reviews a district court's denial of a motion for severance for abuse of discretion. See *United States v. De Varona*, 872 F.2d 114, 120-21 (5th Cir. 1989) (citation omitted). To demonstrate abuse, defendants must show that the joint trial prejudiced them to such an extent that the district court could not provide adequate protection, and the prejudice outweighed the government's interest in the economy of judicial administration. *Id.* The denial of a motion for severance will result in reversal only where defendants can show that they were unable to obtain a fair trial without a severance. See *United States v. Crauford*, 581 F.2d 489, 491 (5th Cir.1978) (citations omitted). Furthermore, reversal is only warranted when the appellant demonstrates that the trial court was unable to afford protection against compelling prejudice. *Id.* Thus, a showing of compelling prejudice is required before we may overrule the district court's decision regarding severance. See *United States v. Bright*, 630 F.2d 804, 813 (5th Cir.1980) (citation omitted).

[7] James and Ray contend that the evidence showed separate transactions that are similar only in that they occurred in the

same location with the same informants during the same time period. The evidence, however, reveals cooperative conduct among the three defendants. Ray and Featherston distributed cocaine base. Ray and James participated in jointly manufacturing and distributing cocaine base, and Ray made referrals to Featherston. The Government made a complete and coherent case against each defendant. The jury considered the counts against each defendant individually, and returned the guilty verdicts against defendants separately; there is no indication that the jury did not consider each defendant individually or each offense separately. See *Arzola-Amaya*, 867 F.2d at 1516 (jury able to compartmentalize evidence where trial court explicitly instructed jury to consider each offense separately and each defendant individually). Thus, the defendants' desire to be tried separately was not shown to have outweighed considerations of judicial economy, and the defendants have failed to show prejudice. Accordingly, we find that the district court did not abuse its discretion in denying defendants' motions for severance.

III.

THE TRANSCRIPTS OF AUDIO RECORDINGS

[8] Audio recordings that were made of the undercover drug transactions were played to the jury, and the district court allowed the jury to use the Government's transcripts of these recordings. James, Ray, and Featherston argue that the district court exceeded its discretion by allowing the jury to use these transcripts of audio proceedings. Specifically, the defendants contend that they did not have the opportunity to review the Government's transcripts, that the transcripts contain many

errors, and that the transcripts are generally unreliable. Defendants cite *United States v. Onori*, 535 F.2d 938 (5th Cir.1976) (discussing procedures to be followed where disputed transcripts of tape recordings are involved) as support for their argument.

If the defendants had intended to urge this issue on appeal, then the necessary materials should have been provided to this court. See Fed.R.App.P. 10(b)(2) (explaining appellant's burden to assemble the record on appeal); see also *Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589, 592 (5th Cir.1986) (burden of presenting an adequate record on appeal is on the appellant). These tapes and transcripts, however, were not provided with the record so we are unable to review the merits of the defendants' contentions. In any event, the defendants waived their right to complain about the transcripts because they did not move for a recess or a continuance after the transcripts were admitted in the district court. Cf. *United States v. Osorio*, 929 F.2d 753, 758 (1st Cir.1991) (defendant waives claim of prejudice—due to delayed disclosure of impeachment evidence—when he fails to object, file a motion for dismissal, or a motion for continuance).

IV.

SUFFICIENCY OF EVIDENCE ISSUES

[9,10] In reviewing a challenge to the sufficiency of the evidence in a criminal case, it is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provid-

ed that a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. See *United States v. Hall*, 845 F.2d 1281, 1283 (5th Cir.), cert. denied, 488 U.S. 860, 109 S.Ct. 155, 102 L.Ed.2d 126 (1988) (citation omitted). We review the evidence in the light most favorable to the Government, making all reasonable inferences and credibility choices in favor of the verdict. See *United States v. Evans*, 941 F.2d 267, 271-72 (5th Cir.), cert. denied, — U.S. —, 112 S.Ct. 451, — L.Ed.2d — (1991) (citation omitted).

A. The 21 U.S.C. § 846 Conspiracy

[11-13] James, Ray, and Featherston separately contest their convictions for conspiracy to distribute cocaine.² For the defendants to be convicted of a conspiracy under 21 U.S.C. § 846, the Government must prove beyond a reasonable doubt that: (1) a conspiracy existed, (2) the defendants knew of it, and that with this knowledge, (3) the defendants voluntarily became a part of the conspiracy. See *United States v. Bland*, 653 F.2d 989, 996 (5th Cir.), cert. denied, 454 U.S. 1055, 102 S.Ct. 602, 70 L.Ed.2d 592 (1981) (citations omitted). The conspiracy may be inferred from concert of action. See *United States v. Simmons*, 918 F.2d 476, 484 (5th Cir.1990) (citation omitted). One cannot escape criminal liability on the basis that one played a minor role in the total scheme. See *United States v. Davis*, 666 F.2d 195, 201 (5th Cir.1982) (citations omitted). We conclude that the Government has met its burden.

[14] Ray contends that the evidence merely shows he sold a small amount of

2. Count One of the indictment alleged violations of 21 U.S.C. § 841(a)(1) (possession with intent to distribute and distribution of cocaine base), 21 U.S.C. § 841(b)(1)(A)(iii)

(penalty for possession with intent to distribute and distribution of 50 grams or more of cocaine base), 18 U.S.C. § 2 (principals), and 21 U.S.C. § 846 (conspiracy).

cocaine base over a period of time, but that there was no joint cooperation between himself and the other defendants. James argues that the evidence merely shows unrelated transactions—referrals from one defendant to another with no enmeshing pattern. Featherston argues that he had no association with the other defendants and that he was not involved with their drug transactions.

The defendants' arguments are unconvincing. The evidence at trial showed that James and Ray repeatedly went to the flats where they made multiple crack sales. In September 1989 and October 1989, James sold cocaine base to Ward. In October 1989 James also referred Ward to Ray who sold him cocaine base, and in October 1989 Ray sold more cocaine base to Ward. In January 1990, James was apprehended at an apartment where he was manufacturing cocaine base, and that apartment was in Ray's temporary custody.³ Later that year, James and Ray continued to commit drug offenses, selling crack cocaine and

cocaine base to confidential informants; in November 1989, Featherston was found in the possession of crack cocaine in the flats; on March 12, 1990, Ray referred Ward to Featherston, and Featherston gave drugs in a bottle to Ray who sold the drugs to Ward; later, on March 15, Ray referred Ward to Featherston who sold drugs to Ward (Featherston stated that it was Ray's dope).

In this case the evidence as a whole is sufficient to establish beyond a reasonable doubt that a conspiracy existed, and that each defendant knew of its existence and voluntarily participated in this conspiracy.⁴ The evidence shows that the defendants completed multiple drug transactions in the flats, that the defendants communicated with one another and knowingly agreed to engage in the distribution of cocaine base. The evidence at trial clearly established the conspiratorial relationship between James and Ray.

Although the evidence is less overwhelming with respect to Featherston, it is never-

also testimony that Lewis and Evans had agreed to split the drugs that were manufactured. We rejected the contention that Evans and Lewis did not knowingly and voluntarily participate in the conspiracy. *Id.*

Finally, in *United States v. Simmons*, 918 F.2d 476, 483-84 (5th Cir.1990), we found sufficient evidence to establish the existence of a conspiracy to distribute cocaine where the defendants knew each other, exited a plane together, and were found to be carrying nearly identical packages of cocaine. Although the Government produced no direct evidence that Roser and Simmons mutually agreed to violate federal narcotics laws, the fact that the packages of cocaine both men were carrying were identical supported an inference that the drugs were purchased from the same source. *Id.* at 484. We noted that when added to the other circumstances of the case, this circumstance was enough to infer the requisite concert of action. *Id.*

3. See *infra* note 6.

4. In *United States v. Juarez-Fierro*, 935 F.2d 672, 676-77 (5th Cir.), *cert. denied*, — U.S. —, 112 S.Ct. 402, — L.Ed.2d — (1991), we found sufficient evidence to support a conspiracy conviction where defendant Juarez made arrangements for the transportation of marijuana, directed Government informant Lopez as to when it should be picked up, arranged for storage of the marijuana, and purchased a vehicle to transport Lopez to another city to complete the deal. We rejected Juarez's contention that he was merely in the company of bad men. *Id.* at 677.

Similarly, in *United States v. Evans*, 941 F.2d 267, 271-72 (5th Cir.), *cert. denied*, — U.S. —, 112 S.Ct. 451, — L.Ed.2d — (1991), we again found sufficient evidence to establish a conspiracy where Lewis was present at several meetings at which Evans and DEA agents discussed the manufacture of drugs, and Lewis knew of the criminal activity at the laboratory site. There was

theless persuasive. Featherston had drug-related conversations with Ray, had drug-related contacts with Ray, accepted referrals from Ray and had an apartment in the flats near those frequented by Ray and James. In *United States v. Vergara*, 687 F.2d 57, 60-61 (5th Cir.1982), we noted that while each piece of evidence, standing alone, might have been susceptible to innocent interpretation, when examined in the aggregate, the evidence established Vergara's part in the conspiracy. We also noted that Vergara's conviction would not be reversed because of a minor role in the overall scheme. *Id.* We found that a jury reasonably could have concluded that the evidence establishing that Vergara was also a source of heroin, that coconspirators visited his home, and that Vergara told a coconspirator to take a brown paper bag out of his car which contained heroin, sufficed to establish that Vergara was a culpable member of the conspiracy. *Id.* Looking at the evidence in the light most favorable to the Government, a rational jury could conclude beyond a reasonable doubt that James, Ray, and Featherston agreed to violate narcotics laws.

B. The 18 U.S.C. § 924(c)(1) Convictions

1. James

James maintains that the district court erred in denying his motion for acquittal on Count Fourteen of the indictment, charging him with a violation of 18 U.S.C. § 924(c)(1).⁵ He argues that the Government did no more than prove the proximity

5. Section 924(c)(1) provides in pertinent part:

Whoever, during and in relation to any crime of violence or drug trafficking crime ... uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking

between the cocaine base, himself and the named weapon. He also argues that he did not use the firearm.

[15, 16] The Government, however, need not prove an actual use or brandishing of the weapon. See *United States v. Coburn*, 876 F.2d 372, 375 (5th Cir.1989). The Government may meet its burden by showing that the weapon involved could have been used to protect or have the potential of facilitating the operation, and that the presence of the weapon was connected with the drug trafficking. See *United States v. Blake*, 941 F.2d 334, 342-43 (5th Cir.1991) (citation omitted). In *United States v. Beverly*, 921 F.2d 559, 561-63 (5th Cir.), *cert. denied*, — U.S. —, 111 S.Ct. 2869, 115 L.Ed.2d 1035 (1991), we found that two revolvers and ammunition, located in a safety deposit box under a mattress in a bedroom where cocaine was found and in the apartment that served as the distribution center, were used during and in relation to drug trafficking crimes.

[17] In this case, there is sufficient evidence for a jury to find that James was in the apartment, knew that the gun was under the mattress, and that he could have used the gun to safeguard the narcotics. James was found standing at a table in an apartment in the flats⁶—a table that was covered with large quantities of cocaine hydrochloride, cocaine base, baking soda and razor blades. Approximately six to

crime, be sentenced to imprisonment for five years....

6. The apartment was in the custody of James' brother, Ray. Ray had been given a key to the apartment by the apartment's resident, Charles Mackey.

eight feet from where James was standing. the officers found a loaded .380 caliber semiautomatic pistol under a mattress. During this time, James said to a woman who was with him in the apartment, "Don't say it's mine; don't say it's yours; don't say nothing."

This court has found a conviction under 18 U.S.C. § 924(c)(1) sufficient where the police found loaded weapons and cocaine in a defendant's house. See *United States v. Robinson*, 857 F.2d 1006, 1010 (5th Cir. 1988) (citation omitted). In the case now before us, we find that a reasonable trier of fact could find a connection between the drug conspiracy and the firearm. The evidence was sufficient to support James' conviction on Count Fourteen for use of a firearm in connection with a drug trafficking crime.

2. Featherston

[18] Featherston also argues that his conviction under 18 U.S.C. § 924(c)(1) was not supported by sufficient evidence and that his motion for acquittal should have been granted. We disagree.

On November 19, 1989, after Featherston was stopped by Lubbock police and found with several bundles of cocaine base, Featherston consented to a search of his car. The police found an unloaded .25 semiautomatic pistol under the driver's seat of the car where Featherston had been sitting;⁷ a loaded .357 caliber gun and an unloaded .22 revolver in the trunk of his car; and a box of .22 ammunition in the trunk of Featherston's car.

7. Ammunition for this pistol was found on Featherston.

8. The district court's jury charge is not included in the record nor is it in the briefs.

As this court stated in *United States v. Molinar-Apodaca*, 889 F.2d 1417, 1424 (5th Cir.1989) (citations omitted), the Government is only obligated to show that the firearm was available to provide protection to the defendant in connection with his engagement in drug trafficking. Because the Government may meet its burden by showing that the weapons could have been used to protect the operation and that the presence of the weapons was connected with the drug trafficking, see *United States v. Blake*, 941 F.2d 334, 342-43 (5th Cir.1991) (citation omitted), we conclude that the weapons, the presence of ammunition, and Featherston's accessibility to the weapons could lead a rational trier of fact to find that the weapons could be used during and in relation to a drug trafficking offense.

3. The Jury Instruction Regarding 18 U.S.C. § 924(c)(1)

[19-21] Featherston contends that the district court erred in its jury instruction regarding the firearms offense under 18 U.S.C. § 924(c)(1).⁸ The standard of review for jury instructions is usually whether the court's charge, as a whole, is a correct statement of the law and plainly instructs the jurors as to the principles of law applicable to the fact issues confronting them. See *United States v. Chen*, 913 F.2d 183, 186 (5th Cir.1990) (citations omitted). However, in cases such as this one where the defendant did not object to the jury charge at trial, the district court's charge is subject to a plain error standard. See *United States v. Jones*, 673 F.2d 115, 118-19 (5th Cir.), cert. denied, 459 U.S. 863, 103 S.Ct.

The burden of presenting an adequate record on appeal is on the appellant. See Fed. R.App.P. 10(b)(2).

140, 74 L.Ed.2d 119 (1982); *United States v. Richerson*, 833 F.2d 1147, 1155 (5th Cir. 1987). We therefore review the jury charge to determine if the error was so fundamental as to result in a miscarriage of justice. *Id.*

[22, 23] Featherston argues that the district court improperly instructed the jury that it could consider all three firearms found in his automobile—including the two firearms found in the trunk—to determine whether he used a firearm during a drug trafficking crime. Featherston argues that it was improper for the district court to instruct the jury regarding the two firearms in the trunk because they were not an integral part of the felony. We disagree.

Featherston did not object to the instruction at trial so he would have to show error so fundamental as to result in a miscarriage of justice. See *Jones*, 673 F.2d at 118-19; *Richerson*, 833 F.2d at 1155. After reviewing the record, we cannot say that such an exceptional case is before us. Furthermore, because the contested jury instruction is not in the record, Featherston has waived his argument concerning the jury instruction. See *United States v. Baker*, 611 F.2d 964, 968 n. 4 (4th Cir.1979).

V.

CONCLUSION

Accordingly, we AFFIRM.